

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RIFTON ENTERPRISES, LLC	:	DETERMINATION
	:	DTA NO. 818419
	:	
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1997 through August 31, 1997.	:	

Petitioner, Rifton Enterprises, LLC, 10 Hellbrook Lane, Ulster Park, New York 12487, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1997 through August 31, 1997.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 19, 2001 at 10:30 A.M. and was continued to conclusion at the same location on February 5, 2002 at 10:00 A.M., with all briefs to be submitted by July 19, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Urbach, Kahn & Werlin Advisors, Inc. (David L. Evans, CPA). The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUES

I. Whether a fuel tank purchased by petitioner is exempt from sales and use taxes under Tax Law § 1115(a)(12) as machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property for sale by processing.

II. Whether a fuel tank purchased by petitioner is exempt from sales and use taxes under Tax Law § 1115(a)(21) as property used by or purchased for the use of commercial aircraft for maintenance and repairs.

FINDINGS OF FACT

1. Rifton Enterprises, LLC d/b/a Rifton Aviation Service (“petitioner”) is a fixed base operator located at the Stewart International Airport (“SIA”) in Newburgh, New York.¹ Petitioner is the sole provider of fuel at SIA and provides fuel and fueling services, primarily to airlines and commercial carriers, at the airport. Emery, Atlantic Southeast Airlines and Com Air are among the airlines and commercial carriers which are serviced by petitioner. Most of petitioner’s customers are airlines and commercial carriers which are engaged in interstate commerce. Petitioner neither owns nor operates any commercial aircraft.

2. In 1997, petitioner purchased a 20,000 gallon fuel tank (invoices totaled \$80,868.15). No sales tax was paid on the purchase of this tank. Petitioner reported the purchase of the tank as a taxable purchase on its sales and use tax returns for the quarters ended May 31, 1997 and August 31, 1997 and remitted use tax in the amount of \$5,862.94. Subsequently, petitioner filed an application for a refund of this use tax (the application was received on February 18, 2000). The refund claim, citing to Technical Services Bureau Memorandum TSB-M-80(4)S, contended that the purchase of the tank was exempt pursuant to Tax Law § 1115(a)(21) as it was used for the fueling of commercial aircraft.

3. By letter dated April 17, 2000, the Division of Taxation (“Division”) denied petitioner’s refund claim. The letter stated, in pertinent part, as follows:

¹ A “fixed base operator” is defined in Tax Law § 282(17) as meaning “any person, firm, association or corporation, who or which engages in the sale of kero-jet fuel or aviation gasoline, or both, for airplanes from a fixed and permanent place at an airport within the state.”

The exemption for maintenance services to aircraft can be tax exempt as described in TSB-M-80(4)S to which you refer to support your refund claim. However, the exemption applies to commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce. It does not apply to operators providing maintenance services to airlines.

4. Subsequently, in its petition filed with the Division of Tax Appeals, petitioner, in addition to contending that its purchase of the fuel tank was exempt from tax pursuant to Tax Law § 1115(a)(21), also maintained that, in the alternative, the purchase was exempt pursuant to Tax Law § 1115(a)(12) as equipment for use or consumption directly and predominantly in the processing of tangible personal property.

5. As previously noted, the Division, in its letter which denied petitioner's claim for refund, stated that the exemption set forth in Tax Law § 1115(a)(21) applies to commercial aircraft engaged in intrastate, interstate and foreign commerce and does not apply to operators providing maintenance services to airlines. However, at the hearing, the Division's employee who prepared the letter of denial admitted that, subsequent to the issuance of the letter, he had become aware of recent case law which held that one does not need to be a commercial airline to qualify for this exemption. Nevertheless, his position was that petitioner was not entitled to this exemption from tax because the fuel tank is not directly involved with the maintenance of an aircraft.

6. Simon Wipf, who is employed by petitioner as a quality assurance manager, is responsible for receiving and dispensing aviation fuels and for maintaining the records for these operations. Petitioner's aviation fuel storage facility at SIA consists of two 20,000 gallon tanks each with dispensing and receiving equipment. The tanks are fully separated and are readily transportable. The fuel tanks have a self-contained mechanism which filters, circulates and screens the fuel through a specifically designed pump and channel system for contaminants.

Every airline serviced by petitioner refers to Standards for Jet Fuel Quality Control at Airports, Specification 103 ("Spec 103"), as the fuel quality standard which must be utilized by petitioner, and these airlines audit petitioner annually to ensure that the standards set forth in Spec 103 are being met. The contracts between the various airlines and commercial carriers and petitioner specifically state that petitioner shall comply fully with Spec 103 regarding fuel storage and delivery facilities. Section 1-4 of Spec 103 sets forth the requirements which must be met by fuel storage facilities. These requirements contain a list of equipment which must be included on storage tanks. This equipment is part of the fuel tank purchased by petitioner which is at issue in this matter.

7. Petitioner receives fuel (Exxon brand) from a terminal in Newburgh which is operated by Coastal Fuel. When the fuel tanker arrives at SIA, it must first be checked by security before it is permitted to enter the airport grounds. A fuel tanker may be admitted to the airport only through petitioner; it can never deliver fuel directly to airplanes.

Once the fuel tanker enters petitioner's jet fuel storage facility, there are a number of checks, set forth in Spec 103, which must be performed. Section 1-4 of Spec 103 specifically refers to fuel storage and sets forth guidelines on how petitioner is to receive and distribute fuel. Form 103.02, contained within Spec 103, lists the checks which must be performed. The form requires checking the delivery site and confirming that the tanker is carrying Jet A fuel and is intended for petitioner at SIA.

Spec 103 then requires that certain tests be performed on the fuel. A sample is taken to verify that the fuel is clean which is done by means of a visual test performed by an employee of petitioner. A gallon of the fuel is drained from the tanker into a white porcelain bucket (this is referred to as a "white bucket test"); a rating is given for both color and water content. An API

gravity test is then performed by pouring a specified amount of fuel into a beaker and inserting a slide instrument to measure the density of the fuel. The density level must measure that which is set forth on the bill of receipt.

Using a hydro kit, a water test is then performed by an employee of petitioner. A hydro kit is a jar with a vial containing a white powder. The vial is filled with fuel and is shaken for three minutes. The white powder will turn pink if the proper water content is present. The vial is kept on premises for each load of fuel received by petitioner. Fuel cannot be dispensed into an airplane if it contains more than 25 parts per million of water.

8. If the fuel passes the aforementioned tests, it is then pumped into petitioner's storage facility. Spec 103 sets forth the size, type of metal and type of internal components necessary for the proper storage of fuel.

Differential pressure is measured to ensure that the filters are operating properly. The fuel is monitored to be sure that the tank will not overflow, that there are no leaks and that the hoses are in working order. When the fuel is emptied, an employee of petitioner must physically verify that the tanker is indeed empty. After the fuel has been received, two additional checks are performed. From the sump located at the bottom of the fuel tank, fuel is withdrawn by an employee of petitioner and checked, by means of a white bucket test, for the presence of water. If there is water in the tank, it will be found on the bottom of the tank. If the fuel does not pass the sump test, i.e., it contains more water or impurities than permissible, the whole system must be put out of service. Pursuant to Spec 103, petitioner is allowed to draw a certain number of additional samples to ascertain if the fuel will pass subsequent tests. Occasionally, the fuel will have to be recirculated numerous times through the filtration equipment in the fuel tank to remove the water or impurities and allow the fuel to pass the required tests. At no time during

the employ of petitioner's Quality Assurance Manager, Simon Wipf, who has held the position since November 1997, has petitioner had to reject a load of fuel and send it back to its supplier.

After the load of fuel is filtered into petitioner's tank, Spec 103 requires a minimum settling time to permit water to separate from the fuel and particles time to settle to the bottom of the tank.

9. Fuel from a fuel tanker cannot be dispensed into an airplane without first being filtered and tested per Spec 103. The types of tanks and equipment used by petitioner are what is required by Spec 103. Inside the fuel tank are pipes, filters, chambers, a motor and a sump. A "floating suction" which floats at the top of the fuel tank draws fuel from the cleanest part of the fuel load.

10. Each day, a set of checks are performed by an employee of petitioner to ensure that the fuel quality is maintained. The fuel must be pumped through the pumping system, the system must be pressurized and the filter vessel must be checked. A sump rating determined from the performance of a white bucket test is recorded as is the filter differential pressure.

11. In addition to the daily checks, certain monthly tests must be performed. They include a more detailed filtration test which is performed on the tank with specialized equipment. Fuel is forced through a membrane, the membrane gets color-coded on a chart and an alphanumeric rating is given. The ground which prevents electric sparks is tested; the static charge is equalized and is given a rating. The dispensing nozzle, called a "single point" is opened and the fine string which is inside the single point is checked and cleaned if necessary. Petitioner's fueling facility must be "black carded," i.e., the emergency shut-off and fire extinguisher must be inspected.

12. In order to dispense the fuel to an aircraft, one of petitioner's trucks will go into the fuel storage facility at which time certain pre-checks are performed on the truck. After the fuel is pumped into the truck, it must again sit for a specified time to allow the fuel to settle and to dissipate any electric charges. The fuel is filtered as it enters the truck to screen any impurities from the fuel. The fuel is then ready to be loaded into an aircraft.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts of every retail sale of tangible personal property except as otherwise provided in Article 28 of the Tax Law. Except to the extent that property or services have already been or will be subject to sales tax, Tax Law § 1110(a) imposes a use tax for the use within the State of any tangible personal property purchased at retail. As previously noted (*see*, Finding of Fact "2"), petitioner did not pay sales tax on its purchase of the 20,000 gallon fuel tank, but did pay use tax in the amount of \$5,862.94 and now seeks a refund thereof.

B. Petitioner has the burden of proving that its purchase of a fuel tank was exempt from tax since Tax Law § 1132(c) creates a presumption that all receipts for property mentioned in Tax Law § 1105(a) are subject to tax unless the contrary is established. In addition, "[a]n exemption from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption'" (*Matter of Grace v. State Tax Commn.*, 37 NY2d 193, 196, 371 NYS2d 715, 718, *lv denied* 37 NY2d 708, 375 NYS2d 1027 quoting *People ex rel. Savings Bank of New London v. Coleman*, 135 NY 231, 234). Moreover, as the Tax Appeals Tribunal noted in its citing of *Matter of Niagara Mohawk Power Corp. v. Wanamaker* (286 App Div 446, 144 NYS2d 458, *affd* 2 NY2d 764, 157 NYS2d 972), the statutory language

providing the exemption must be construed in a practical manner (*Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 25, 1995).

C. Tax Law § 1115(a)(12) exempts from sales and use taxes receipts from “[m]achinery or equipment for use directly and predominantly in the production of tangible personal property . . . by manufacturing, processing, generating, assembling, refining”

Petitioner contends that the fuel tank is used for processing. It states that without “processing” the fuel within the tank, petitioner would not be able to meet the standards for Jet A fuel as provided in Spec 103. Petitioner alleges that without the proper settlement time, filtering in and out of the fuel unit, color tests and circulation within the equipment, the fuel would not be suitable for use by commercial aircraft.

D. 20 NYCRR 528.13(b)(1) defines the following terms:

(i) *Administration* includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) *Production* includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

20 NYCRR 528.13(b)(2) provides as follows:

The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

E. As the Division, in its brief, correctly notes, the Jet A fuel, when received into petitioner’s tank, is not a raw material. While some testing, settling and water removal are

performed upon the fuel, it is, nevertheless, Jet A fuel when purchased from petitioner's supplier, Coastal Fuel. Petitioner is in no way involved in the actual production of the Jet A fuel nor does it substantively alter the fuel other than to remove potentially excessive levels of water, impurities or electric charge. As noted in 20 NYCRR 528.13(b)(1)(i), even the testing of raw materials is deemed to be an administrative activity; certainly the testing of the Jet A fuel, i.e., the finished product, can be nothing other than an administrative activity as well. Moreover, Example 2 in 20 NYCRR 528.13(b)(3) holds that "[t]esting equipment used to test incoming materials is not used in production and is subject to tax." Since storing and loading finished products (such as loading the fuel into the truck for dispensing into the aircraft) have heretofore been categorized as distribution (*see*, 20 NYCRR 528.13[b][1][3]), it is clear that petitioner's tank and related equipment perform both administration (testing) and distribution (storing and loading) functions and, therefore, pursuant to 20 NYCRR 528.13(b)(2), it does not qualify for the exemption under Tax Law § 1115(a)(12).

F. The Tax Law imposes a sales tax on the receipts from "[i]nstalling tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . except . . . such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article." (Tax Law § 1105[c][3][v]).

G. Tax Law § 1115(a)(21) exempts from sales tax the receipts from the sale of "[c]ommercial aircraft primarily engaged in intrastate, interstate or foreign commerce, machinery or equipment to be installed on such aircraft and property used by or purchased for

the use of such aircraft for maintenance and repairs and flight simulators purchased by commercial airlines.”

H. Petitioner relies upon TSB-M-80(4)S(*supra*) as support for its position that its purchase of the fuel tank was exempt from tax as property used by or purchased for the use of commercial aircraft for maintenance and repairs. As properly noted by petitioner, the exemption set forth in Tax Law § 1115(a)(21) is not limited to purchases *by* commercial aircraft; the exemption also applies to property used by or purchased for use in maintenance and repairs of commercial aircraft (*Matter of Aero Instruments and Avionics, Inc.*, Tax Appeals Tribunal, October 5, 1995). Therefore, despite the fact that petitioner neither owns nor operates any commercial aircraft, by virtue of the fact that the fuel tank is used primarily in the fueling of commercial airlines and carriers, if it is found that the fuel tank was purchased for the use of these commercial airlines and carriers for maintenance and repairs, the exemption set forth in Tax Law § 1115(a)(21) would be applicable.

I. 20 NYCRR 527.5(a)(3) provides that “[m]aintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.”

Technical Services Bureau Memorandum (TSB-M-80[4]S), entitled “Exemptions for Commercial Aircraft,” set forth examples of purchases for qualifying exempt commercial aircraft which included, among other things: parts and accessories, maintenance and line services, fuel, fueling and defueling, oil, grease and other supplies.

The Division maintains that fuel is not aircraft equipment and, therefore, the fuel tank is never used to maintain aircraft or aircraft equipment. Yet, in its brief, the Division, citing

TSB-M-80(4)S, admits that items such as parts and accessories, oil, grease, de-icing, aircraft cleaning, engine preheat charges and removal of aircraft lavatory refuse are items used in maintenance and repairs. Conveniently, the Division has omitted mention of fuel, fueling and defueling which are also specifically mentioned as exempt purchases for commercial aircraft. Surely, the items cited in the Technical Services Bureau memorandum, such as fuel, are not aircraft equipment. However, admittedly, they are used to maintain aircraft or aircraft equipment.

J. The Division, in its brief, contends that the fuel tank purchased by petitioner is used in its fuel sale business to store fuel and that petitioner does not service commercial aircraft when it sells fuel to the airlines. It maintains that fuel is not aircraft equipment and, therefore, the tank is never used to maintain aircraft or aircraft equipment. As previously discussed, to qualify for the exemption, it is not necessary that the fuel or the fuel tank be aircraft equipment; it is sufficient if the tank is “property used by or purchased for the use of such aircraft for maintenance and repairs” (Tax Law § 1115[a][21]).

The Division further contends that even if it is determined that the tank is predominantly used to maintain aircraft, the tank purchase still does not qualify for the exemption because it must be used *directly* in the maintenance and repair of commercial aircraft. This is so, the Division alleges, because there is no physical or temporal connection between the tank and the aircraft due to the fact that the fuel is pumped from the tank into a fuel truck (where it must remain until the electric charges contained in the fuel dissipate) prior to its being dispensed into the aircraft.

This position is without merit. There is no requirement in the statute (Tax Law § 1115[a][21]) that equipment be *directly* used to maintain or repair the aircraft. Utilization of a

fuel truck, by petitioner, to deliver the fuel from the tank to the aircraft does not negate the actual function of the tank.

K. As petitioner correctly maintains, fuel is a component part of the aircraft, i.e., it cannot fly without the proper fuel. Further, the fuel which arrives at the airport is in a state which cannot be directly loaded into the aircraft, and it must first be tested and prepared by petitioner, by means of this fuel tank and the equipment contained therein. The fuel tank and related equipment maintain the integrity of the fuel for commercial aircraft.

The Division's regulations (20 NYCRR 527.5[a][3]) explain that the term "maintaining" refers to activities that relate to "keeping personal property in a condition of fitness, efficiency, readiness or safety." Without fuel, it is obvious that an aircraft cannot be in a condition of fitness or readiness. And most importantly, without this fuel tank and the equipment which is a part thereof, the fuel cannot be kept "in a condition of fitness, efficiency, readiness or safety." While the tank cannot be found to be involved in the actual production or processing of the Jet A fuel (*see*, Conclusion of Law "E"), the equipment which is a part of the tank filters, circulates and screens the fuel and permits careful testing, on a daily, weekly and monthly basis, to ensure that the fuel meets the stringent requirements of Spec 103. Contrary to the Division's allegations, petitioner's fuel tank and the equipment contained therein are not utilized merely to store fuel. Clearly, if the tank was used simply to store fuel which was immediately ready to be dispensed into an aircraft, the Division's position that the tank was not used for maintenance of commercial aircraft would have merit. However, the evidence produced herein relating to the elaborate filtering, testing and circulating requirements which petitioner must comply with pursuant to Spec 103 indicates that the tank performs the function of keeping the Jet A fuel in a condition of fitness, efficiency, readiness or safety which fuel,

likewise, keeps the commercial aircraft in a similar condition. Therefore, it must be found that the fuel tank and the equipment which is part of the tank qualifies for the exemption from tax as provided in Tax Law § 1115(a)(21).

L. The petition of Rifton Enterprises, LLC is granted and the Division of Taxation is hereby directed to issue a refund of use tax to petitioner in the amount of \$5,862.94, plus applicable interest.

DATED: Troy, New York
January 2, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE